82-1285

NO. 82-1116

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

W.J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Petitioner

v.

RAY FRENCH,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Respondent, Ray French, respectfully requests that the Court deny the Petition for Writ of Certiorari.

OPINIONS BELOW

The report and recommendation of the United States Magistrate, adopted by the United States District Court for the Northern District of Texas (the "District Court") on February 9, 1982, is reproduced in Appendix "D" of Petitioner's Petition for Writ of Certiorari (the "Petition"). The panel opinion of the United States Court of Appeals for the Fifth Circuit (the "Court of Appeals") is French v. Estelle, 592 F.2d 1021 (5th Cir. 1982), and is reproduced in Appendix "C" of the Petition. The opinion of the Court of Appeals issued in denial of Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc, as amended, is French v. Estelle, 696 F.2d 318 (5th Cir. 1983), and is reproduced in Appendix "A" of the Petition.

JURISDICTION

This Court has jurisdiction of the case under 28 U.S.C. §1254(1). On December 6, 1982, the Court of Appeals entered

its judgment affirming the decision of the District Court to grant the writ of habeas corpus. On December 29, 1982, the Court of Appeals denied Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc. Thereafter, within sixty (60) days of the final judgment in this case, the Petition was filed.

QUESTION PRESENTED

Is a federal habeas corpus petitioner who requests affirmance of a district court's judgment granting habeas corpus relief on a claim raised but not decided below but who fails to cross-appeal within fourteen days from the date on which the State gave notice of appeal barred from asserting such claim where he is proceeding pro se and there is clear precedent establishing that if the appellate court does not consider such claim, it will be affirming a judgment which violates the petitioner's Constitutional rights under the Double Jeopardy Clause of the United States Constitution?

FEDERAL RULE INVOLVED

Rule 4(a)(3), of the Federal Rules of Appellate Procedure provides as follows:

> If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

COUNTERSTATEMENT OF THE CASE

This is an action in federal habeas corpus in which Respondent seeks relief on the basis of insufficient evidence to support enhancement of his sentence to life and requests that the judgment granting such relief be so

fashioned as to protect him from being twice subjected to jeopardy in violation of his constitutional rights.

The facts and judicial course of this case prior to the federal habeas corpus proceedings are accurately described in the opinion of the Court of Appeals in French v. Estelle, 592 F.2d 1021, 1022-23 (5th Cir. 1982) (Petition at C-1). On January 29, 1981, Respondent filed a petition for habeas corpus relief in the United States District Court for the Northern District of Texas. French v. Estelle, No. CA2-81-016. In the petition, Respondent asserted three separate claims: (1) there was insufficient evidence to support his conviction because at trial the state had failed to introduce any evidence of the date on which the offense giving rise to the second conviction used for enhancement purposes was committed (the "insufficient evidence" claim); (2) he was denied effective assistance of counsel at trial by the failure of counsel to require the State to produce evidence of the date on which the offense giving rise to the second conviction used for enhancement purposes was committed; and (3) he was denied effective assistance of counsel during appeal of his conviction by the failure of appellate counsel to raise the insufficient evidence claim (the "ineffective assistance of counsel" claim).

In his report and recommendation to the District Court, the Magistrate reported that although the State had produced no evidence of the date on which the offense giving rise to the second conviction used for enhancement purposes was committed, he would recommend resolution of the case on the ineffective assistance of counsel claim "to avoid the concomitant problem of Greene v. Massey, 437 U.S. 19 (1978)", and the possibility that the case would warrant the application of the Double Jeopardy Clause of the federal Constitution. On February 9, 1982, the District Court

adopted such recommendation and granted habeas corpus relief on the ineffective assistance of counsel claim. The order of the District Court provided that:

> "THE STATE OF TEXAS SHOULD HAVE THE OPPORTUNITY TO RETRY [RESPONDENT] FOR THE OFFENSE OF BURGLARY AND, AT THE OPTION OF THE STATE, WITH THE PRIOR CONVICTIONS BEING ALLEGED IN THE INDICTMENT FOR ENHANCEMENT PURPOSES."

On March 8, 1982, Petitioner gave timely notice of appeal. Respondent, who was proceeding pro se did not file notice of cross-appeal on or before March 22, 1982, fourteen (14) days after the date on which Petitioner gave notice of appeal. Approximately 10 months after Petitioner's notice of appeal was filed, counsel was appointed for Respondent. In his brief on appeal Respondent urged the application of the insufficient evidence claim and argued that under the authority of the Court of Appeal's decision in Bullard v. Estelle, 665 F.2d 1347 (5th Cir. 1982), vacated, ____ U.S.L.W. ____ (U.S. Jan. 17, 1983) (hereinafter "Bullard") the lack of sufficient evidence to support Respondent's life sentence required the court to modify the District Court's judgment so as to bar the State from resentencing Respondent under the life sentence statute. Respondent argued that the Double Jeopardy prohibition enunciated in Bullard compelled the Court of Appeals to affirm the granting of the writ of habeas corpus, but and modify the order so as to preclude resentencing using the prior convictions previously insufficiently proven at the first sentencing trial.

Petitioner contended that Respondent's failure to file notice of cross-appeal barred review of the insufficient evidence claim because affirmance of the District Court's judgment on that basis would allow Respondent to receive greater relief than that accorded under the existing District Court judgment.

On December 6, 1982, the Court of Appeals held that there was insufficient evidence to support Respondent's life sentence and that under the authority of its prior decision in Bullard, the Double Jeopardy Clause of the United States Constitution barred the State from conducting a second enhancement trial on the basis of the prior felony conviction insufficiently proven at the first sentencing proceeding. Thereafter, on December 16, 1982, Petitioner filed a Motion for Rehearing En Banc alleging that Respondent's failure to cross appeal barred him from appellate review of the insufficient evidence claim. On December 29, 1982, treating Petitioner's motion as a Petition for Panel Rehearing, the Court of Appeals held that failure to cross appeal did not preclude review of the insufficient evidence claim where the Double Jeopardy violation was clear and the court was affirming a decision to grant habeas corpus relief to a pro se petitioner. Finally, on January 28, 1983, Petitioner filed the instant Petition requesting this Court's consideration of the question whether a federal habeas corpus petitioner who desires relief greater than that accorded by the district court below is required by Rule 4(a)(3), Federal Rules of Appellate Procedure, to file a notice of cross appeal.

REASONS FOR DENYING THE WRIT

I. There are no special or important questions presented by the case which would merit this Court's consideration.

This Court should deny the Petition because there are virtually no special or important reasons for granting it. Contrary to Petitioner's allegations, there is no square and irreconcilable conflict between this case and the opinion of the United States Court of Appeals for the Seventh Circuit in Stachulak v. Coughlin, 520 F.2d 931 (7th Cir. 1975),

cert. denied, 424 U.S. 947 (1947) (hereinafter "Stachulak"), while there is clear precedent in this Court and in the Court of Appeals for the decision in this case. More significantly, assuming that this Court granted certiorari and reversed the Court of Appeals on the basis that the insufficient evidence claim should never have been decided, the Court's opinion would be frivolous since Respondent would still be entitled to protection against a second life sentence conviction under state law as enunciated by the Texas Court of Criminal Appeals in Ex parte Augusta, 639 S.W.2d 481 (Tex. Crim. App. - 1982). The proper course for this Court to follow is to summarily deny the petition for certiorari. In the alternative, the Court should grant the Petition and simultaneously vacate the judgment and remand the case with instructions that Respondent's petition for federal habeas corpus relief be dismissed without prejudice to his right to reapply to the state courts for appropriate relief.

A. The Decision of the Court of Appeals does not present a square and irreconcilable conflict with the decision of the United States Court of Appeals for the Seventh Circuit.

The decision of the United States Court of Appeals for the Seventh Circuit in Stachulak, being is distinguishable on its facts, does not present a square and irreconcilable conflict with the instant case. Stachulak involved a challenge by a petitioner to the standard of proof applied by the State of Illinois in his conviction and confinement under a state statute. The district court held that the standard of proof applied under the statute violated the petitioner's right to Due Process, thereby warranting federal habeas corpus relief. The order of the court provided that the petitioner was to be enlarged unless, within 60 days from the date thereof, the state undertook a

renewed commitment proceeding using the proper standard of proof.

On appeal by the state, the petitioner sought to affirm the judgment below on the grounds that the statute was void for vagueness and overbreadth in violation of the Fourteenth Amendment's Due Process and Equal Protection Clauses. The petitioner had not cross-appealed from the district court's judgment below. Noting that the effect of a favorable resolution of the vagueness claim would be to release the petitioner with no recourse by the State to a renewed commitment proceeding and that a cross-appeal must be taken where the effect of an attack is to enlarge the petitioner's rights under a judgment, the court held that absent the cross appeal, the vagueness claim could not be entertained.

In the instant case, the District Court granted relief under the theory of ineffective assistance of counsel, although Respondent also raised the insufficient evidence claim The order of the District Court provided that the writ should issue unless the State elected to retry Respondent within 60 days, with the prior convictions being alleged in the retrial indictment at the option of the State. On appeal, Respondent urged affirmance of the decree on the insufficient evidence claim and the recent decision of the Court of Appeals in Bullard which held that where evidence adduced at the first enhancement proceeding is insufficient to establish a requisite element of the Texas life sentence statute, the Double Jeopardy Clause of the United States Constitution bars the State from bringing a second enhancement-to-life proceeding. Finding the insufficient evidence claim clearly demonstrated, the Court of Appeals applied Bullard. The court reasoned that Respondent's failure to cross appeal from the decision below did not bar it from applying the proper law. Noting that

the Double Jeopardy violation was clear and that it was affirming the District Court's decision to grant habeas relief to a pro se petitioner, the court stated: "refusal to affirm on (the insufficient evidence claim) would be closing our eyes to a clear violation of the law and to a denial of petitioner's constitutional rights".

The distinctions between this case and Stachulak are clear: in the instant case Respondent was pro se, in Stachulak the petitioner was represented by counsel throughout all proceedings. Additionally, in this case Bullard indicated that the terms of the District Court's judgment violated Respondent's federal Double Jeopardy rights, whereas in Stachulak, there had been no case deciding the void for vagueness claim in the petitioner's favor. Such distinctions clearly demonstrate that there is no conflict in the circuits which would warrant this Court's review.

B. There is ample precedent in this Court and in the Court of Appeals for the determination that the absence of a cross-appeal does not preclude a court from affirming a judgment on a claim raised but not decided below, notwithstanding that a favorable disposition of that claim will give rise to greater relief.

The Federal Rules of Appellate Procedure and the Rules of the Supreme Court provide that after an appellant has filed notice of an appeal the appellee is allowed an additional number of days to file a cross-appeal or cross-petition. Under the Supreme Court Rules, the filing deadline is thirty (30) days; under the Appellate Rules, the deadline is fourteen (14) days.

As a general rule, a cross-appeal or cross-petition is required if the appellee seeks to change the judgment below or any part thereof. In Massachusetts Mutual Life Ins. Co.

v. Ludwig, 426 U.S. 479, 480-81 (1976), the general rule was stated as follows:

"Unless he takes a cross appeal...the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it."

In the instant case, the Court of Appeals determined that notwithstanding the general rule, a cross-appeal was not necessary where there was a clear violation of the Double Jeopardy Clause of the federal Constitution and the appellee was a habeas corpus petitioner proceeding pro se.

Contrary to Petitioner's contentions there are ample decisions of this Court and of the Court of Appeals which support this decision. These cases indicate that notwithstanding any resulting modification in the judgment below, a court may reach an issue of law raised, argued and briefed to the lower court where resolution of that issue is necessary to prevent a miscarriage of justice, See Thornton v. Schweiker, 663 F.2d 1312, 1315 (5th Cir. 1981); Martinez v. Mathews, 544 F.2d 1233, 1237 (5th Cir. 1976), or to avoid a situation where the court would be closing its eyes to a clear violation of the law. See Empire Life Ins. Co. v. Valdale Corp., 468 F.2d 330, 334 (5th Cir. 1972). See also United State v. ITT Continental Baking Co., 420 U.S. 223, 226-27 n.2 (1975) (cross-appeal rule does not extend to the jurisdiction of the Court to decide a case but rather constitutes only a rule of practice for the control of the Court's docket); Scherk v. Alberto-Culver, 417 U.S. 506, 525 (1974) (dissent).

C. Granting certiorari to consider the cross-appeal question would be frivolous because notwithstanding the

extent of relief Respondent obtains in the federal courts, his right to be secure from double jeopardy is now ensured under the Texas Constitution as established in Ex Parte Augusta.

Whether or not the Court of Appeals was correct in affirming the granting of habeas corpus relief on the basis of the insufficient evidence claim, a reversal of that court's judgment by this Court would be frivolous because Respondent could still obtain the identical relief he is seeking in state court. On October 6, 1982, in Ex parte Augusta, 639 S.W.2d 481 (Tex. Crim. App. - 1982), the Texas Court of Criminal Appeals held that where there has been insufficient evidence to support a life sentence, the Double Jeopardy Clause of the Texas Constitution precludes retrial under the life sentence statute. Thus, notwithstanding whether Rule 4(a)(3) bars him from succeeding on the insufficient evidence claim in federal court under Ex Parte Augusta, Respondent can assert such claim in state court and obtain the relief he seeks.

While Respondent raised the insufficient evidence claim in two of three of his initial state applications for habeas corpus relief, the failure of Respondent to succeed in those proceedings does not bar him from seeking state relief again. See Tex. Code Crim. Pro. §11.07 (Vernon 1977). It is well established in Texas law that the denial of a petition for writ of certiorari is not a final judgment giving rise to res judicata. Indeed the only recourse which an unsuccessful petitioner has is to bring another habeas corpus application. See Ex Parte Mayes, 538 S.W.2d 637 (Tex. Crim. App. - 1976); Ex Parte Noble, 176 S.W.2d 951 (1943).

Aside from further recourse in the state courts, under Rule 60(b)(5), Federal Rules of Civil Procedure, Respondent

could file a motion in District Court to vacate the order on the basis that in light of Ex Parte Augusta it is no longer equitable that the judgment should have prospective application to him.

In System Federation No. 91, Railway Employees' Dept. v. Wright, 364 U.S. 642 (1961), this Court held that a consent decree which enjoined certain railroad and unions from discriminating against nonunion employees would be modified in light of the 1951 amendment of the Railway Labor Act to permit, under certain circumstances, a contract requiring a union shop. In determining that the district court had abused its discretion in refusing to modify the decree, the Court noted that "if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed or new ones have since arisen" a proper exercise of judicial discretion calls for modification of its terms. Thus, it is recognized that a change in the judicial view of the law subsequent to the entry of a final judgment or order which renders its prospective application inequitable may justify relief under Rule 60(b)(5). Accord Butler v. Eaton, 141 U.S. 240 (1891); Michigan Surety Co. v. Service Machinery Corp., 277 F.2d 531 (5th Cir. 1960); Block v. Thousandfriend, 170 F.2d 428 (2d Cir. 1948).

In the instant case, the prospective application of the District Court's order could cause Respondent to be resentenced under the life sentence statute notwithstanding the protection afforded to him by Article V, Sections 14 and 19 of the Texas Constitution. Clearly, the prospective application of the District Court's order is no longer equitable and, to prevent a miscarriage of justice, Respondent can seek relief in the District Court under Rule 60(5)(b). Because Respondent can obtain relief under a motion made pursuant to Rule 60(b)(5) notwithstanding this

Court's decision that Respondent's failure to cross-appeal barred the Court of Appeals from considering the insufficient evidence claim, this Court should deny the Petition. In the alternative, under principles of comity, the Court should grant the Petition and simultaneously vacate the judgment and remand the case with instructions that Respondent's federal petition for habeas corpus relief be dismissed without prejudice to his right to reapply to the State courts for appropriate relief. State v. Payton, 390 F.2d 261, 270 (5th Cir. 1968) (under principles of comity, federal habeas corpus proceeding by state prisoner would be dismissed without prejudice to the petitioner's right to seek relief under adequate state post-conviction procedures which became available after federal proceeding had begun, even though prior thereto state remedies had been exhausted and relief could also be obtained on remand to the federal district court).

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY certify that a copy of the foregoing Brief in Opposition was served on opposing counsel by mailing a copy of same, certified mail, return receipt requested or hand delivering same, on the 14th day of April, 1983. Notice was further given that the original of same was being filed with the Clerk of the aforementioned Court.

Kim B. Andres

Kim B. Andres